

WISCONSIN COURT OF APPEALS
DISTRICT II

Appeal No. 18-AP-1189

SANDRA J. WEIDNER,

Petitioner/Appellant,

v.

CITY OF RACINE,

Respondent,

MILWAUKEE JOURNAL SENTINEL,
USA TODAY NETWORK – WISCONSIN,
THE WISCONSIN FREEDOM OF INFORMATION
COUNCIL, THE WISCONSIN NEWSPAPER
ASSOCIATION, and THE WISCONSIN
BROADCASTERS ASSOCIATION,

Intervenor Petitioners.

Appeal from Orders of the
Circuit Court for Racine County,
the Honorable Eugene Gasiorkiewicz Presiding,
Circuit Court Case No. 17-cv-1644

MOTION TO INTERVENE

INTRODUCTION

Milwaukee Journal Sentinel, USA Today Network – Wisconsin, The Wisconsin Freedom Of Information Council, The Wisconsin Newspaper Association, and The Wisconsin Broadcasters Association (the “News Media” or “Intervenor Petitioners”) move, pursuant to Wis. Stat. § 809.13, to intervene in this proceeding and for an order opening the file to Intervenor Petitioners’ counsel for the purpose of allowing them to address the merits of this appeal.

This appeal relates to the decisions and orders of the Circuit Court for Racine County sealing all pleadings as confidential (the “Seal Orders”). In addition to the Seal Orders, the Circuit Court issued a decision and order on petitioner Sandra Weidner’s open records request also under seal (the “Open Records Decision”). Finally, on October 3, 2018, the Circuit Court held Ms. Weidner, a public official, in

contempt for violating the Seal Orders (the “Contempt Decision”). While the Contempt Decision was issued in open court – providing the public a glimpse into the Circuit Court’s rationale – the reasoning behind the Seal Orders and Open Records Decision remains unknown to the public. Indeed, *all* pleadings are under seal, and even the docket is unavailable for viewing by order of Judge Gasiorkiewicz. *See* Wisconsin Circuit Court Access, Case No. 17-cv-1644.

This Motion to Intervene should be granted because the News Media meet the requirements for intervention outlined in Wis. Stat. § 803.09. Allowing the News Media to intervene will not unduly delay the proceedings nor prejudice the adjudication of the rights of the original parties. The public’s interest in transparency and access to the courts weighs strongly in favor of granting this Motion to Intervene and opening the record to Intervenor Petitioners’ counsel.

PROCEDURAL HISTORY

Petitioner Weidner has represented Racine's 6th Aldermanic District for nearly twenty years. In 2017, she ran for mayor of Racine. In August 2017, the Racine City Attorney requested that the entire Racine City Council attend a meeting of the Executive Committee normally composed of only the city attorney, the mayor, the heads of three standing committees, and one other alderman. At that meeting, the City Attorney gave a PowerPoint presentation that related to emails that petitioner Weidner had sent to constituents. The City Attorney sought the committee's vote for an advisory opinion from the city's Ethics Board on whether petitioner Weidner had violated the city's ethics ordinance. After petitioner Weidner's requests for the City Attorney's PowerPoint presentation were denied, she filed this public records lawsuit against the City of Racine.

At one of the first hearings in this matter, the Circuit Court sealed the *entire* record. Accordingly, the precise dates and docket entries in this case are unknown to Intervenor Petitioners and the public. In or around April 2018, the Circuit Court issued its ruling on petitioner Weidner's open records claim. Again, that ruling is under seal. On October 3, 2018, petitioner Weidner was held in contempt for violating the Seal Orders by, allegedly, releasing information in the sealed documents.

Moreover, as both the pleadings and docket of this appeal are under seal, even the scope of this appeal is not transparent. To the extent that this appeal concerns whether the Circuit Court correctly sealed the *entire* record in this proceeding and whether it correctly ruled on petitioner Weidner's open records claim, the News Media has a direct and substantial interest in this appeal as the public has both a

statutory and constitutional right to an open and accessible judiciary.

ARGUMENT

The News Media should be allowed to intervene as a matter of right in this matter, pursuant to Wis. Stat. § 809.13, which states:

A person who is not a party to an appeal may file in the court of appeals a petition to intervene in the appeal. . . . The court may grant the petition upon a showing that the petitioner's interest meets the requirements of s. 803.09(1) or (2).

Section 803.09(1) establishes a four-part test that the proposed intervenor must meet: (1) timely application for intervention; (2) an interest relating to the property or transaction that is the subject of the action; (3) that the disposition of the action may, as a practical matter, impair or impede the proposed intervenor's ability to protect that interest; and (4) that the proposed intervenor's interest is not adequately represented by existing parties. *See Bilder v.*

Town of Delavan, 112 Wis. 2d 539, 545, 334 N.W.2d 252 (1983) (citing Wis. Stat. § 803.09(1)). The News Media's Motion to Intervene satisfies these conditions.

1. The News Media's Motion to Intervene is Timely.

The News Media is unable to identify what, if any, specific actions have been taken in this appeal to date given that, as with the Circuit Court docket, the Court of Appeals docket is not accessible to the public. It is the News Media's understanding, however, that the record on appeal has not been, or only recently was, transmitted to the Court of Appeals. Accordingly, briefing on the merits of this appeal likely will not begin until at least the middle of December. *See* Wis. Stat. § 809.19. Therefore, as there is ample time for the Court of Appeals to rule on the News Media's Motion to Intervene before turning to the merits of the appeal, neither party will be prejudiced by the News Media's intervention.

See Bilder, 112 Wis. 2d at 258 (concluding that the intervention was both proper and timely given that it did not prejudice either party.)

2. The News Media Has An Interest Relating To The Transaction That Is The Subject Of This Action.

The News Media has a direct and substantial interest in the opening of the Circuit Court record to public examination. Pursuant to Wis. Stat. § 59.20(3), every clerk of the circuit court “shall open to the examination of any person all books and papers required to be kept in his or her office and permit any person so examining to take notes and copies of such books, records, papers or minutes” The News Media can enforce this public right because it qualifies as persons who properly come under the umbrella of the Wisconsin statutes providing public rights of examination of public records. *See Bilder*, 112 Wis. 2d at 546 (citing *State ex rel. Journal Co. v. County Court*, 43 Wis. 2d 297, 308, 168 N.W.2d 836 (1969)).

In *Bilder*, the Wisconsin Supreme Court concluded that a newspaper's interest in opening a court file was a legally protected interest under Wis. Stat. § 59.14, the predecessor to Wis. Stat. § 59.20, and that the issue raised by the newspaper related to the transaction that was the subject of the action. Petitioner-appellant in that case had created the issue when he moved to seal the court file on the day he filed his action and when the court permanently sealed the file. *Id.* at 546-47. Here, the News Media has that same legally protected interest under Wis. Stat. § 59.20, which became the subject of this action when the Circuit Court sealed the entire record in this matter.

3. The Disposition Of The Action Will, As A Practical Matter, Impair And Impede The News Media's Ability To Protect Its Interest.

The News Media's interest is the public's interest. The public's First Amendment Right in judicial transparency weighs strongly in favor of granting the News Media's

Motion to Intervene to allow it to weigh in on the merits of whether the Circuit Court correctly sealed the entire record in this case. *See* Wis. Stat. § 757.14 (“the sitting of every court shall be public and every citizen may freely attend the same”). While the First Amendment right of access to the courts may not be absolute, it cannot be ignored. Proceedings cannot be closed “unless specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Press-Enter. Co. v. Superior Court of California for Riverside Cty.*, 478 U.S. 1, 13-14 (1986); *see also State ex rel. LaCrosse Tribune v. Circuit Court*, 115 Wis. 2d 220, 340 N.W.2d 460 (1983).

Without access to the record, of course, Petitioner Intervenor have no way of assessing whether closure was essential to preserve some higher value. Regardless, no circumstances under which Petitioner Intervenor are aware

could justify the sealing of the *entire* record. Certainly more narrowly tailored tools were at the Circuit Court's disposal that could have served some "higher value" prompting the sealing of certain records in this case.

4. The News Media's Interest Is Not Adequately Represented By The Existing Parties.

Again, because the record is under seal, the News Media is not privy to the reasoning behind the decision to seal the entire record. The Circuit Court's October 3, 2018 decision on the City of Racine's motion for contempt did, however, reference the fact that the City of Racine's request to place the record under seal may not have been contested by petitioner Weidner or any other party. Accordingly, as it is unclear whether – or to what extent – petitioner Weidner will argue for the opening of the court file on this appeal, the News Media's interest in opening that file is not currently represented in this matter.

CONCLUSION

For each of the reasons set forth above, the News Media respectfully requests that this Court grant this Motion to Intervene and, in doing so, grant their counsel access to the record that has been sealed by the Circuit Court for the purpose of filing a brief on the merits.

Dated this 29th day of October, 2018.

GODFREY & KAHN, S.C.

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